IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| JOHN GRALESKI, | § | |
| | § | No. 89, 2011 |
| Claimant Below, | § | |
| Appellant, | § | Court Below: Superior Court of |
| | § | the State of Delaware, in and for |
| v. | § | Kent County |
| | § | |
| ILC DOVER, | § | C.A. No. 09A-06-005 |
| | § | |
| Employer Below, | § | |
| Appellee. | § | |

Submitted: June 22, 2011
Decided: July 26, 2011

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

**O R D E R**

This 26th day of July 2011, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. John Graleski ("Graleski" or "Claimant"), the claimant-below, appeals from a Superior Court order affirming the decision of the Industrial Accident Board ("IAB") awarding him compensation for his back injury, but denying him compensation for his left knee injury. On appeal, Graleski claims that the IAB and the Superior Court erroneously concluded that his knee injury claim was time-barred. We find no error and affirm.

2. In 1986, Graleski began working for the employer-below appellee, ILC Dover ("ILC"), building blimps. Over the next 22 years, Graleski spent 90 to 95%

of his time there kneeling or crawling on the work floor as part of his job. During that period and while working at ILC, Graleski suffered two injuries, one to his left knee and the other to his back. He filed two separate petitions with the IAB, one for each injury. The IAB consolidated both petitions for purposes of conducting a hearing and issuing a decision.[1] Only the IAB's decision as to Graleski's knee injury claim is before us on this appeal.

3. In 2002 Graleski fell at work and injured his hip. Although he visited his family doctor, Dr. Lewandowski, for treatment for the hip, he did not complain about any knee pain at that time. Not until two years later, on November 9, 2004, did Graleski first report to Dr. Lewandowski that he was experiencing pain in his left knee. Dr. Lewandowski had Graleski undergo a series of diagnostic tests, including an MRI, a CAT scan, and x-rays. On December 15, 2004, Dr. Lewandowski placed Graleski on work restrictions, and wrote ILC a note explaining that Graleski could no longer kneel while at work.

4. Graleski was also referred to Dr. Schwartz, a knee specialist, for further diagnosis. On December 22, 2004, Dr. Schwartz examined Graleski and concluded that his knee pain was related to his work at ILC. Dr. Schwartz also

[1] Graleski's knee injury claim forms the basis for IAB Petition No. 1295616, and his back injury claim forms the basis for IAB Petition No. 1315045. The IAB consolidated the two petitions in the interest of judicial economy, because the petitions involved the same parties, insurance carrier, doctors, and attorneys. Decision on Petition to Determine Compensation Due and Petition to Determine Additional Compensation Due at 4 (May 21, 2009) (hereinafter "*IAB Decision*").

believed that surgery was required. On February 11, 2005, Graleski underwent arthroscopic knee surgery, and was instructed not to return to work until March 14, 2005.

5. On April 4, 2005, Graleski informed his doctors that he was "feeling much better," but by late 2005, his knee pain had returned. In March 2006, Graleski began treatment with another knee specialist, Dr. Dushuttle, who ordered a new MRI. Based on the MRI results, Graleski underwent a second knee operation on May 10, 2006. As a result of the second surgery, Graleski was out of work from May 10, 2006 through July 10, 2006. During a post-operation visit, Graleski reported that he was doing well, with no major complaints.

6. On December 15, 2006, Graleski petitioned the IAB for compensation for his knee injury and for an unrelated back injury.[2] A trial was originally scheduled for April 16, 2007. On February 8, 2007, both parties stipulated to a continuance, which the IAB granted on February 21, 2007. The next day, February 22, 2007, Graleski's attorney wrote a letter to the IAB explaining that the parties' issues "ha[d] been resolved" and that a hearing was no longer necessary.[3] By

[2] The record shows that although Graleski's petitions were stamped as received by the Department of Labor on December 15, 2006, he had also faxed his petitions to the Department on either December 6, 2008 or December 8, 2006. *IAB Decision* at 15 & n.11.

[3] Counsel's letter stated "[p]lease be advised that the issues set for trial in this case, previously scheduled for 04/16/2007, have been resolved. Please take the hearing off the Board's calendar." *Id.* at 2, n.1.

notice dated March 15, 2007, the IAB advised the parties that, based on the February 22nd letter, the rescheduled trial date was cancelled.[4]

7. On December 13, 2007, Graleski sent a letter to the IAB requesting a new hearing date. Graleski's December 13th letter included copies of his original December 15, 2006 petitions and the IAB's February 21, 2007 continuance order, but did not reference his February 22, 2007 letter advising the IAB that the matter had been resolved. At that point, the Department of Labor informed Graleski that he needed to file a new petition in order to proceed. Graleski then re-filed his two petitions on February 8, 2008.

8. In response, ILC argued to the IAB that Graleski's February 8, 2008 knee injury claim was barred by the two-year statute of limitations under 19 *Del. C.* § 2361(a),[5] because Graleski first discovered that his knee injury was a work-related injury in December 2004. Moreover, although Graleski's initial 2006 knee injury petition may have been filed within the two-year statutory period, that petition was deemed to have been withdrawn by Graleski's February 22, 2007 letter. Therefore (ILC argued), Graleski's February 8, 2008 re-filed knee injury petition was untimely.

[4] *Id.* at 3, n.2, *see also id.* at 19-20.

[5] 19 *Del. C.* § 2361(a) (setting a two-year statute of limitations).

9. On June 9, 2008, the IAB conducted a hearing to determine the compensation due as a result of Graleski's knee and back injuries. As for the knee injury claim, the IAB found that the two-year statute of limitations began to run on December 15, 2004, the date that Graleski first became aware of the serious and compensable nature of that injury based on his doctor's work restriction order.[6] And, although Graleski's initial 2006 knee injury petition was timely filed, that petition was deemed withdrawn by his February 22, 2007 letter advising the IAB that the matter had been "resolved" and that no hearing was necessary.[7] Nevertheless, the IAB determined, *sua sponte*, that the Delaware Savings Statute[8] applied, giving Graleski until December 15, 2007 (one year from the expiration of the two-year limitations period) to re-file his knee injury petition.[9] Even with that extension, however, Graleski did not re-file his knee injury petition until February 8, 2008. Accordingly, the IAB found Graleski's new petition untimely, and denied him compensation for his knee injury claim.[10]

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[6] *IAB Decision* at 16-17.

[7] *Id.* at 20.

[8] 10 *Del. C.* § 8118(a).

[9] *IAB Decision* at 19.

[10] *Id.* at 20. The IAB did, however, award Graleski compensation for his back injury claim. The statute of limitations on his back injury claim did not begin to run until October 11, 2006. Therefore, Graleski's February 8, 2008 re-filing for his back injury claim was still within the two-year statutory period.

10. Graleski appealed the IAB's denial of his knee injury claim to the Superior Court.[11] He claimed that the IAB erred in applying the Savings Statute, because the one-year extension did not begin to run until the IAB deemed his original 2006 knee injury petition withdrawn on February 22, 2007. Therefore, Graleski argued, his February 8, 2008 re-filing was timely.

11. The Superior Court affirmed the IAB's determination that Graleski's knee injury claim was time-barred, but for a different reason.[12] The court upheld the IAB's determination that the two-year statute of limitations began to run on December 15, 2004.[13] The court then concluded, however, that the IAB erred in holding that the Savings Statute applied, because that statute had no application where, as here, a complainant voluntarily withdraws his petition.[14] That is, Graleski's February 22, 2007 letter constituted a voluntary withdrawal of his 2006 knee injury petition. It therefore was not an "abatement" or dismissal for "any matter of form" that would have triggered the extra one-year filing period under the Savings Statute.[15] Accordingly, the statutory period for Graleski to file his

[11] ILC cross-appealed the IAB's decision to award compensation for Graleski's back injury, which was affirmed by the Superior Court. ILC has not appealed that ruling to this Court.

[12] *Graleski v. ILC Dover*, C.A. No. 09A-06-005, Slip op. at 3 (Del. Super. Ct. Nov. 17, 2010).

[13] *Id.* at 13-15.

[14] *Id.* at 15-16.

[15] *Id.* at 16-18, 22-23.

knee injury claim expired on December 15, 2006, and Graleski's re-filed knee injury petition of February 8, 2008 was untimely. Graleski appeals from those rulings.

12. On appeal to this Court, Graleski claims that both the IAB and the Superior Court erred in concluding that his knee injury petition was time-barred. Graleski argues that the IAB misapplied the Delaware Savings Statute, 10 *Del. C.* § 8118(a), when determining that his claim was barred by the statute of limitations, because his petition did not "abate" under Section 8118(a) until February 22, 2007. Therefore, he had until February 22, 2008 to re-file his knee injury petition. Graleski next claims that the Superior Court erred in concluding that the Savings Statute was inapplicable, because ILC did not appeal from that portion of the IAB's decision, and therefore, the Savings Statute issue was not properly before the Superior Court.[16] Alternatively, he contends, even if the Superior Court correctly considered the Savings Statute, that court applied the statute erroneously.

13. This Court's review of an IAB decision mirrors that of the Superior Court. We examine the record to determine whether the IAB's decision is supported by substantial evidence and is free from legal error.[17] Whether a

[16] To reiterate, ILC cross-appealed the IAB's decision as to Graleski's back injury claim, but took no appeal from the IAB's decision as to Graleski's knee injury claim.

[17] *Vincent v. Eastern Shore Mkts.*, 970 A.2d 160, 163 (Del. 2009).

particular statute is applicable is an issue of law that we review *de novo*.[18] Absent an error of law, we review for an abuse of discretion.[19] Substantial evidence "equates to such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[20] In conducting that form of review, we do not weigh the evidence, determine questions of credibility, or make our own factual findings.[21]

14. The Superior Court properly considered the issue of whether the IAB's *sua sponte* application of the Savings Statute was error. By appealing the IAB's decision that his knee injury claim was time-barred, Graleski also raised for review the subsumed issue of whether the IAB correctly applied the Savings Statute. Graleski's argument to the Superior Court was that the IAB correctly found that the Savings Statute governed, but misapplied that statute in determining the date from which the extra one-year savings period would have run.[22]

15. That argument raises the predicate issue of whether the IAB correctly determined that the Savings Statute applied at all. Graleski cannot limit the issue

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[18] *Id.*

[19] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

[20] *Id.* (internal quotation marks and citation omitted).

[21] *Id.* (internal quotation marks and citation omitted).

[22] For example, Graleski's opening brief read: "[t]he [IAB] was also correct when it held that Claimant did not withdraw his original petition and that the 'savings statute' applied due to an administrative error." But he went on to argue that the IAB "incorrectly read" the Savings Statute as to when the extra one-year filing period began to run.

on appeal to *how* the Savings Statute applies, because any *de novo* review of the IAB's legal conclusions logically subsumes that predicate question.[23] It was therefore appropriate for the Superior Court to consider whether the statute applied at all, before addressing Graleski's claim that the IAB's application of that statute to these facts was error.[24] Nor, as the Superior Court noted, was Graleski prejudiced by the court's consideration of that issue, because both parties had fully briefed that question.[25]

16. Graleski's arguments before us also placed in issue the threshold applicability of the Savings Statute. In his opening brief, Graleski argues to us that the IAB erred in determining the date on which his 2006 knee injury petition was "abated." That argument implicitly assumes that there was an "abatement" within the meaning of the Savings Statute. The Superior Court correctly concluded that there was no abatement, for which reason the Savings Statute did not apply.

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[23] *Vincent*, 970 A.2d at 163. ("Where the issue raised on appeal from a Board decision involves exclusively a question of the proper application of the law, our review is *de novo*." (internal quotations marks and citation omitted)). The same standard of review applies before the Superior Court. *Pugh v. Wal-Mart Stores, Inc.*, 2007 WL 1518970, at *2 (Del. Super. Ct. May 2, 2007) ("When the issue raised on appeal from the IAB is exclusively a question of the proper application of the law, review by this Court is *de novo*.").

[24] *See Pugh*, 2007 WL 1518970, at *2.

[25] *See* Slip op. at 2, n.1 (noting that Graleski had fully "briefed" the issue and therefore, the Superior Court was "equipped with the information necessary to address the merits of all issues raised by the parties in this appeal.").

17. The Superior Court concluded that the IAB had erroneously relied upon the Savings Statute, for two reasons. First, the IAB "[o]perat[ed] on the incorrect assumption that it could waive ILC's statute of limitations defense."[26] Second, the IAB wrongly interpreted the Savings Statute to apply where "no real prejudice has been imposed on an opposing party, and where the opposing party has at least received timely notice of the petitioner's intent to litigate."[27] That was an improper application of the Savings Statute, the Superior Court held, because 10 *Del. C.* § 8118(a) enumerates only six circumstances that trigger the extra one-year period, none of which is implicated here.[28] Specifically, the Superior Court found that Graleski's 2006 knee injury petition was not "abated" or "otherwise avoided . . . for any matter of form" within the meaning of Section 8118(a), because that petition had not been dismissed by reason of a technical flaw, lack of jurisdiction, or improper venue, as the statute required.[29] Rather, Graleski's petition had been

[26] *Id.* at 16.

[27] *Id.*

[28] *Id.* at 17, 23.

[29] *Id.* at 20-21 ("There is simply no way that the words "matter of form" or "abatement" in [the Savings Statute] can be stretched to encompass the [IAB's] determination that [Graleski] withdrew his claim."). Although the IAB did not explicitly specify in its decision which of the six circumstances it was relying upon, the Superior Court took the IAB's use of italics to indicate that the IAB had focused its attention on the phrase "if the writ is abated, or the action otherwise avoid or defeated . . . for any matter of form." *Id.* at 17.

deemed voluntarily withdrawn based on the representations in his February 22, 2007 letter.[30]

18. The Superior Court did not err in so concluding. The Savings Statute, 10 *Del. C.* § 8118(a), creates six exceptions to the applicable statute of limitations in circumstances where a plaintiff has filed a timely lawsuit, but has been procedurally barred from obtaining a resolution on the merits.[31] Relevant here is the fourth exception, which provides that:

> If in any action duly commenced within the time limited therefor in this chapter . . . if the writ is *abated*, or the action otherwise avoided or defeated by the death of any party thereto, or *for any matter of form* . . . a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.[32]

19. That exception does not help Graleski, because his 2006 knee injury petition was not "abated . . . or otherwise avoided or defeated . . . for any matter of form." As the United States Court of Appeals for the Third Circuit has explained, "abatement" has traditionally encompassed two distinct legal meanings: "1) at common law, an abatement was an overthrow of a suit, the equivalent of a dismissal; [and] 2) in equity, an abatement was an interruption or suspension of a

[30] *Id.* at 23.

[31] *Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009).

[32] 10 *Del. C.* § 8118(a) (emphasis added).

suit, the equivalent of a stay of proceedings."[33] Since neither meaning applies here, the question becomes whether Graleski's 2006 knee injury petition was dismissed or stayed "for any matter of form," so as to entitle him to an extra year to re-file that petition.

20. An action is "avoided or defeated" for a "matter of form" if it is dismissed based on procedural technicalities,[34] for example, where service of process on a defendant is found insufficient.[35] A voluntary withdrawal of a complaint, however, does not constitute a dismissal or stay based on a matter of form. Graleski's 2006 knee injury petition was not dismissed or stayed based on a technical flaw or a jurisdictional or venue defect.[36] Rather, his petition was removed from the IAB's calendar at his own request, based upon his representation that "the issues set for trial in this case . . . have been resolved. Please take the

[33] *Baer v. Fahnestock & Co.*, 565 F.2d 261, 263 (3d. Cir. 1977).

[34] *See Empire Fin. Servs., Inc. v. Bank of N.Y.*, 2001 WL 755936, at *1 n.3 (Del. Super. Ct. Jan. 12, 2001) (citing cases where Delaware courts have applied the savings statutes where the prior decision was decided upon "procedural technicalities").

[35] *See, e.g.*, *Gaspero v. Douglas*, 1981 WL 10228, at *3 (Del. Super. Ct. Nov. 6, 1981) (holding that the Savings Statute applies "where a prior timely action has been dismissed because of a failure to perfect service of process within the period of limitations.").

[36] *See Savage v. Himes*, 2010 WL 2006573, at *2 (Del. Super. Ct. May 18, 2010) (concluding that the phrase "the action otherwise avoided or defeated . . . for any matter of form" refers to when a case is dismissed because of a technical flaw in a complaint or writ, or a jurisdictional defect); *O'Donnell v. Nixon Uniform Serv. Inc.*, 2003 WL 21203291, at *5 (Del. Super. May 20, 2003) (concluding that "avoiding or defeating" an action for a "matter of form" is "directed toward instances such as lack of jurisdiction or filing in the wrong venue.").

hearing off the [IAB's] calendar."[37] Graleski's use of the word "resolved" here indicates that the parties had settled their dispute, and that no further action was required.[38] Indeed, the IAB interpreted Graleski's February 22, 2007 letter "as notice of resolution of the petition,"[39] and informed the parties that the hearing had been cancelled, as requested.

21. Graleski cannot now argue that his 2006 knee injury petition was not "voluntarily withdrawn," because his February 22, 2007 letter to the IAB represented otherwise. Because a voluntary withdrawal of a petition based on a settlement does not constitute an abatement or dismissal "for any matter of form," the Superior Court correctly concluded that the Savings Statute did not apply.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[37] *IAB Decision* at 2, n.1.

[38] *See, e.g., Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Tex.*, 962 A.2d 205, 207 (Del. 2008) (noting that the parties "entered into a settlement agreement to 'fully and finally resolve'" the action).

[39] *IAB Decision* at 19-20; *see also id.* at 3, n.2.